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CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CAROL WALKER,

Plaintiff,

vs.

CITY AND COUNTY OF SAN
FRANCISCO, SERGEANT JUSTIN ERB;
and DOES 1 through 20, inclusive,

Defendants.

Case No. 16-cv-06053 EDL

**DEFENDANT CITY AND COUNTY OF SAN
FRANCISCO'S ANSWER TO COMPLAINT
FOR WRONGFUL DEATH AND VIOLATION
OF CIVIL RIGHTS**

DEMAND FOR JURY TRIAL

I. INTRODUCTION

Defendant City and County of San Francisco ("Defendant") hereby responds to plaintiff's Complaint ("Complaint").

1. In response to this paragraph, defendant lacks information sufficient to enable it to form a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

2. Fearing for his life, and the lives of his partner and the public, Sergeant Erb discharged his firearm at a suspected car thief who, in an attempt to evade arrest, recklessly drove a vehicle in

1 such a way as to endanger him and others around him. Witnesses stated that the suspect attempted
2 several times to run over police officers.

3 **II. JURISDICTION AND VENUE**

4 3. In response to this paragraph, defendant lacks information sufficient to enable it to form
5 a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

6 4. In response to this paragraph, defendant lacks information sufficient to enable it to form
7 a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

8 5. In response to this paragraph, defendant lacks information sufficient to enable it to form
9 a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

10 **III. PARTIES**

11 6. In response to this paragraph, defendant lacks information sufficient to enable it to form
12 a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

13 7. Admitted.

14 8. Defendant denies the allegations contained in this paragraph.

15 9. Defendant admits all allegations in this paragraph except those contained in the final
16 sentence of this paragraph, the truth of which defendant denies.

17 10. Defendant admits all allegations in this paragraph except those contained in the final
18 sentence of this paragraph, the truth of which defendant lacks information sufficient to enable it to
19 form a belief of its truthfulness or falsity, and on that basis denies the allegation.

20 **IV. FACTS**

21 11. Defendant is informed and believes that on May 19, 2016, Jessica Williams was
22 engaged in a felony crime and was under the extreme influence of methamphetamine, at which time
23 San Francisco police officers attempted to arrest her, whereupon she, in an attempt to evade arrest,
24 recklessly drove a vehicle in such a way as to endanger Sergeant Erb and others, and according to
25 witnesses attempted to run over the police officers. Fearing for his life, and the lives of his partner and
26 the public, Sergeant Erb discharged his firearm at the vehicle.

27 12. In response to this paragraph, defendant lacks information sufficient to enable it to form
28 a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

1 13. In response to this paragraph, defendant lacks information sufficient to enable it to form
2 a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

3 **V. CLAIMS FOR RELIEF**

4 **FIRST CLAIM FOR RELIEF**

5 **42 U.S.C. Section 1983-Excessive Force (Against Defendant Justin Erb)**

6 14. Defendant hereby incorporates by reference all previous responses as if set forth in full.

7 15. In response to this paragraph, defendant lacks information sufficient to enable it to form
8 a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

9 16. Defendant denies the allegations contained in this paragraph as it is not a complete
10 statement of the law. Persons who commit violent felonies and who fail to surrender to arrest do not
11 enjoy the same protections as law-abiding citizens.

12 17. Defendant denies the allegations contained in this paragraph as it is not a complete
13 statement of the law. Persons who commit violent felonies and who fail to surrender to arrest do not
14 enjoy the same protections as law-abiding citizens.

15 18. Defendant denies the allegations contained in this paragraph as it is not a complete
16 statement of the law. Persons who commit violent felonies and who fail to surrender to arrest do not
17 enjoy the same protections as law-abiding citizens.

18 19. Defendant denies the allegations contained in this paragraph.

19 20. Defendant denies the allegations contained in this paragraph.

20 21. Defendant denies the allegations contained in this paragraph.

21 22. In response to this paragraph, defendant lacks information sufficient to enable it to form
22 a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

23 23. Defendant denies the allegations contained in this paragraph.

24 24. Defendant denies the allegations contained in this paragraph.

25 25. In response to this paragraph, defendant lacks information sufficient to enable it to form
26 a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

27 26. Defendant denies the allegations contained in this paragraph.

27. Defendant denies the allegations contained in this paragraph. Defendant is informed and believes that no constitutional right was violated, and if there was a violation, such right was not sufficiently established.

28. In response to this paragraph, defendant lacks information sufficient to enable it to form a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

29. In response to this paragraph, defendant lacks information sufficient to enable it to form a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

30. Defendant denies the allegations in this paragraph.

SECOND CLAIM FOR RELIEF

Wrongful Death (Against Defendant Justin Erb)

31. Defendant hereby incorporates by reference all previous responses as if set forth in full.

32. In response to this paragraph, defendant lacks information sufficient to enable it to form a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

33. Defendant denies the allegations in this paragraph.

34. In response to this paragraph, defendant denies any allegations of negligence and lacks information sufficient to enable it to form a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

35. In response to this paragraph, defendant lacks information sufficient to enable it to form a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

36. Defendant denies the allegations in this paragraph.

37. In response to this paragraph, defendant lacks information sufficient to enable it to form a belief as to the truth of the allegations therein, and, on that basis, defendant denies the allegations.

THIRD CLAIM FOR RELIEF

Respondeat Superior (Against Defendant San Francisco)

38. Defendant hereby incorporates by reference all previous responses as if set forth in full.

39. Defendant does not understand the allegations in this paragraph, but denies that any employee was negligent or careless. As to the remaining parts of this paragraph, defendant lacks

1 information sufficient to enable it to form a belief as to the truth of the allegations therein, and, on that
2 basis, defendant denies the allegations.

3 **VI. PRAYER**

4 Responding to the allegations in plaintiff's prayer for relief, defendant objects to them and as to
5 those that make allegations defendant lacks information sufficient to enable it to form a belief as to the
6 truth of the allegations in those paragraphs, and, on that basis, defendant denies the allegations.

7 Defendant further denies any allegation inadvertently unaddressed, and any and all prayer for
8 damages.

9 **JURY DEMAND**

10 Defendant joins in plaintiff's request for a jury trial.

11 **SEPARATE AFFIRMATIVE DEFENSES**

12 **FIRST AFFIRMATIVE DEFENSE**

13 (Failure to State a Claim)

14 Plaintiff fails to state facts sufficient to constitute a cause of action against any defendant.

15 **SECOND AFFIRMATIVE DEFENSE**

16 (Assumption of Risk - Peril)

17 Defendant alleges that decedent realized and appreciated the alleged danger which presented
18 itself at the time of the happening of the event set forth in the Complaint herein; that decedent,
19 voluntarily placed herself in a position of peril, and that the loss or damage, if any, sustained by
20 plaintiff was caused by said risks which were accepted and voluntarily assumed by decedent, when
21 engaging in said activity.

22 **THIRD AFFIRMATIVE DEFENSE**

23 (Assumption of the Risk)

24 Defendant alleges that decedent had full knowledge of the risks involved in the activity in
25 which she was engaged at the time of the incident set forth in the Complaint herein; that decedent
26 voluntarily assumed all the risks incident to the activity engaged in at the time and place mentioned in
27 said Complaint; and that the loss or damage, if any, sustained by the plaintiff was caused by said risks
28 that were accepted and voluntarily assumed by decedent.

1 **FOURTH AFFIRMATIVE DEFENSE**

2 (Failure to Mitigate Damages)

3 Defendant alleges that the Complaint and each and every cause of action therein is barred
4 because plaintiff/decedent failed to use reasonable diligence to mitigate damages allegedly sustained
5 by them, and said failure bars or reduces the recovery, if any, from defendant.

6 **FIFTH AFFIRMATIVE DEFENSE**

7 (Defendant's Act Not a Proximate Cause)

8 Defendant states that any act or omission on the part of the answering defendant, its agents or
9 employees, was not the proximate cause of plaintiff's injury.

10 **SIXTH AFFIRMATIVE DEFENSE**

11 (Denial of Damages)

12 Defendant denies that plaintiff has been damaged in any sum or sums, or otherwise, or at all,
13 by reason of any act or omission of any defendant.

14 **SEVENTH AFFIRMATIVE DEFENSE**

15 (Immunity)

16 Defendant alleges the provisions of the California Tort Claims Act of the California
17 Government Code (Government Code §810 *et seq.*) as a measure of the duty of the City and County of
18 San Francisco and its employees.

19 **EIGHTH AFFIRMATIVE DEFENSE**

20 (Immunity)

21 Defendant claims the immunities under the applicable provisions of the California Government
22 Code, including without limitation sections 820.8, 830-835.4.

23 **NINTH AFFIRMATIVE DEFENSE**

24 (Barred by Tort Claims Act and Failure to file Claim)

25 Defendant alleges that to the extent the Complaint includes allegations within the scope of the
26 California Tort Claims Act, the Complaint is barred by the following provisions of the California Tort
27 Claims Act: Government Code sections: 815; 815(b); 815.2(b); 815.4; 818.2; 818.4; 818.6; 818.7;
28 818.8; 820; 820(b); 820.2; 820.8; 821.2; 821.4; 821.6; 821.8; 822; 822.2; 830.2; 830.4; 830.6; 830.8;

830.9; 831; 831.2; 831.4; 835.4; 840; 840.6; 844.6; 845; 845.2; 845.4; 845.8; 850; 80.2; 850.4; 854.8;
855; 855.2; 855.4; 855.6; 855.8; 856; 856.2; 956.4.

TENTH AFFIRMATIVE DEFENSE

(Good Faith)

Defendant alleges that the employees, officials and agents of defendant were at all times material hereto acting with both subjective and objective good faith, such that any claim for relief that plaintiff may have is barred by law.

ELEVENTH AFFIRMATIVE DEFENSE

(Frivolous Action)

Plaintiff's maintenance of this action is frivolous, vexatious and unreasonable, thereby entitling defendant to sanctions and appropriate remedies (including without limitation attorney's fees) against plaintiff.

TWELFTH AFFIRMATIVE DEFENSE

(Unclean Hands)

The Complaint and each cause of action therein are barred by the doctrine of unclean hands.

THIRTEENTH AFFIRMATIVE DEFENSE

(Proper Conduct)

As a separate and affirmative defense to the Complaint and to each and every allegation contained therein, defendant alleges that at all times and places mentioned in the Complaint, defendant acted without malice and with a good faith belief in the propriety of its conduct.

FOURTEENTH AFFIRMATIVE DEFENSE

(Acting in Good Faith)

As a separate and affirmative defense to the Complaint and to each and every allegation set forth therein, defendant alleges that at all times mentioned in the Complaint, defendant performed and discharged in good faith each and every obligation, if any, owed to plaintiff.

1 **FIFTEENTH AFFIRMATIVE DEFENSE**

2 (Privilege)

3 As a separate and affirmative defense to the Complaint and to each and every allegation
4 contained therein, defendant alleges that its conduct at all times material herein was privileged and/or
5 justified under applicable state and Federal law.

6 **SIXTEENTH AFFIRMATIVE DEFENSE**

7 (Immunities)

8 As a separate and affirmative defense to the Complaint and to each and every allegation
9 contained therein, defendant asserts the various immunities conferred upon it pursuant to the
10 California Government Code, and other applicable provisions of law including, but not limited to,
11 those contained in Division 3.6 of Title 1 of the California Government Code.

12 **SEVENTEENTH AFFIRMATIVE DEFENSE**

13 (Public Liability Act)

14 Defendant alleges the provisions of the Public Liability Act of the California Government
15 Code as the sole and exclusive measure of defendant's duties and liabilities in this action.

16 **EIGHTEENTH AFFIRMATIVE DEFENSE**

17 (Immunity: Exemplary Damages)

18 Defendant alleges that San Francisco, as a public entity, is immune from liability for
19 exemplary damages herein pursuant to Section 818 of the California Government Code.

20 **NINETEENTH AFFIRMATIVE DEFENSE**

21 (Decedent's Conduct Reckless and Wanton)

22 Defendant alleges that at all times mentioned in plaintiff's Complaint herein, decedent acted in
23 a careless, reckless, wanton and negligent manner in and about the matters set forth in the Complaint;
24 that such careless, reckless, wanton and negligent conduct proximately contributed to the injuries and
25 damages, if any, sustained or claimed by plaintiff; that as a consequence, plaintiff's claim is barred.

1 **TWENTIETH AFFIRMATIVE DEFENSE**

2 (Discretionary Act Immunity)

3 Defendant alleges that the act or omissions which plaintiff claims give rise to liability in this
4 case were within the discretion of San Francisco employees acting within the course and scope of their
5 employment and, as a result, plaintiff's claim is barred by the discretionary act immunity contained in
6 California Government Code section 820.2 and its related provisions.

7 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

8 (Privilege)

9 Defendant alleges that if any force was used by defendant against the decedent herein, said use
10 of force was the lawful exercise of the right of self-defense and defense of the public and privileged by
11 law, and any recovery pursuant to said use of force is barred.

12 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

13 (Justified Use of Force)

14 The Complaint and each cause of action therein is barred because the use of force against the
15 decedent by the employees of defendant, if any, was privileged and justified.

16 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

17 (Comparative Negligence)

18 Defendant alleges by way of a plea of comparative negligence that decedent was negligent in
19 and about the matters and activities alleged in the Complaint; that decedent's negligence contributed to
20 and was a proximate cause of decedent and/or plaintiff's alleged injuries and damages, if any, or was
21 the sole cause thereof; and that if plaintiff is entitled to recover damages against defendant by virtue of
22 the Complaint, defendant prays that the recovery be diminished or extinguished by reason of the
23 negligence of the decedent in proportion to the degree of fault attributable to the decedent.

24 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

25 (Arrest)

26 Defendant alleges that if any force was used to effect the arrest of the decedent herein by the
27 Doe defendants, such force was authorized and privileged pursuant to Sections 835 and 835a of the
28

1 California Penal Code and as a proximate result thereof, plaintiff is barred from any recovery herein
2 for any alleged injury or damage if any there were.

3 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

4 (Resisting Arrest)

5 Defendant alleges that decedent was under a duty pursuant to Section 834a of the California
6 Penal Code to refrain from using force or a weapon to resist her arrest; that decedent breached her duty
7 even though she knew or by the exercise of reasonable care should have known that she was being
8 arrested by a peace officer; that as a direct and proximate result of decedent's breach of this duty
9 plaintiff is barred from recovery for any loss or damage plaintiff may have incurred, if any there be.

10 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

11 (Plaintiff/Decedent Assaulted Police)

12 Defendant alleges that at all times mentioned in plaintiff's Complaint herein, decedent
13 willfully, wantonly, maliciously, and unlawfully committed a violent assault on the persons of the
14 arresting officers; that it became and was necessary to use force on the person of the decedent to
15 defend said arresting officers from said violent assault on their persons; that the injuries, if any, and
16 damages, if any, incurred by plaintiff were proximately caused by the necessary use of said reasonable
17 force on the person of decedent and not otherwise; and that by reason of decedent instituting said
18 vicious and violent assault on the persons of said arresting officers, decedent's failure and refusal to
19 desist from continuing said assault, and the consequent necessity to use reasonable force to defend said
20 arresting officers from said assault, plaintiff's claim, if any, is barred by law.

21 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

22 (Prevent Injury/Escape)

23 Defendant alleges that no more force was used on decedent's person than was necessary to
24 effect detention, overcome any resistance thereto, prevent escape there from, and prevent injury to the
25 officers and the public and to facilitate and safeguard a valid police investigation.

1 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

2 (Qualified Immunity)

3 Defendant alleges that this lawsuit is barred, in whole or in part, by the doctrine of qualified
4 immunity.

5 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

6 (Immunity from Injury Caused by Person Resisting Arrest)

7 Defendant alleges that, pursuant to California Government Code section 845.8, defendant is
8 immune from liability as a matter of law for injury caused to plaintiff by a person resisting arrest.

9 **THIRTIETH AFFIRMATIVE DEFENSE**

10 (Failure to State Relief Under 42 U.S.C. 1983)

11 Defendant alleges that plaintiff has failed to allege facts in the Complaint sufficient to state a
12 claim for relief under 42 U.S.C. 1983 against defendant, its agents, employees and particularly its
13 police officers.

14 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

15 (City and County of San Francisco Not a Proper Party)

16 Defendant alleges that plaintiff has failed to allege sufficient, specific facts against defendant, a
17 public entity, to state a claim for relief under 42 U.S.C. §§ 1983 or 1985.

18 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

19 (Mutual Combat)

20 Defendant alleges that decedent had full knowledge of the risks involved in the mutual combat
21 activity in which she engaged and set forth in the Complaint herein; that decedent voluntarily assumed
22 all the risks incident to the activity engaged in at the time and place mentioned in said Complaint, and
23 that the loss or damage, if any, sustained by plaintiff were caused by said risks, which were accepted
24 and voluntarily assumed by decedent when she engaged in said activity.

1 **THIRTY-THIRD AFFIRMATIVE DEFENSE**

2 (Self Defense)

3 Defendant alleges by way of a plea of self-defense that defendant employees honestly and
4 reasonably believed that decedent was about to inflict harm upon them and that the use of force, if any,
5 was done reasonably and in self-defense.

6 **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

7 (No Breach of Duty)

8 Defendant further alleges that it is not liable for any cause of action based in negligence, as
9 they have breached no duty of care owed to plaintiff.

10 **ADDITIONAL AFFIRMATIVE DEFENSES**

11 1. Defendant presently has insufficient knowledge or information on which to form a
12 belief as to whether it may have additional, as yet unstated, defenses available. Defendant reserves the
13 right to assert additional defenses in the event that discovery indicates that they would be appropriate.

14 WHEREFORE, Defendant prays for judgment as follows:

- 15 1. That Plaintiff take nothing from Defendant;
16 2. That the Complaint against Defendant be dismissed with prejudice;
17 3. That Defendant recover its costs of suit herein, including attorneys' fees; and
18 4. For such other relief as is just and proper.

19 Defendant respectfully demands a jury trial.

20 Dated: November 22, 2016

21 DENNIS J. HERRERA
22 City Attorney
23 CHERYL ADAMS
24 Chief Trial Deputy
SEAN F. CONNOLLY
Deputy City Attorney

25 By: /s/ Sean F. Connolly
26 SEAN F. CONNOLLY

27 Attorneys for Defendant
28 CITY AND COUNTY OF SAN FRANCISCO